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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. AARON PATRICK MARTIN, Defendant and Appellant.	F057333 (Super. Ct. No. F90429001-1) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. James L. Quaschnick, Judge.

Rita Swenor, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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[*]Before Vartabedian, Acting, P.J., Wiseman, J., and Gomes, J.

On September 25, 1990, at approximately 3:00 a.m., appellant, Aaron Patrick Martin, knocked on the door of a Carl's Jr. Restaurant in Fresno. Martin was holding some keys that had been taken from the restaurant a month earlier when Martin's steam cleaning crew had cleaned the restaurant. Marion Parrish was in the restaurant doing paperwork and opened the door for Martin. Martin told Parrish he had been fired. He then held up a knife and stated that he had come for his compensation. Martin entered the restaurant and slit Parrish's throat with the knife and stabbed her numerous times before fleeing with $444.

On March 11, 1991, a jury convicted Martin of attempted murder (count 1/Pen. Code, §§ 664/187),[1] assault with a deadly weapon (count 2/§ 245, subd. (a)(1)), and robbery (count 3/§ 211). The jury also found true a great bodily injury enhancement (§ 12022.7) in each count, a weapon enhancement (§ 12022, subd. (b)) in counts 1 and 3, and a serious felony enhancement (§ 667, subd. (a)).

On April 12, 1991, the court sentenced Martin to an aggregate, indeterminate term of 14 years to life. The court also ordered Martin to pay a $5,000 restitution fine.

On March 3, 2009, Martin filed a motion for modification of sentence asking the court to reduce his restitution fine to $200 because the court did not make a finding that he had the ability to pay a fine of $5,000 and alleging that the 10 percent administrative fee charged by the Department of Corrections and Rehabilitation to inmates to collect restitution fines they owed was punitive. The court denied the motion the same day.

Martin's appellate counsel has filed a brief, which summarizes the facts, with citations to the record, raises no issues, and asks this court to independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) However, in a document filed on November 20, 2009, Martin reiterates the arguments he made in the trial court in support

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[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

of his motion to modify his sentence. We will conclude that the order denying his motion to modify his sentence was not an appealable order and dismiss his appeal.

Section 1237 allows a defendant to appeal from "a final judgment of conviction" (§ 1237, subd. (a)), and "any order made after judgment, affecting the substantial rights of the party" (§ 1237, subd. (b)).

Section 1170, subdivision (d), allows the court "within 120 days of the date of commitment *on its own motion,* or at any time upon the recommendation of the secretary or the Board of Parole Hearings, [to] recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced[.]" (Italics added.)

"Section 1170 subdivision (d) does not confer standing on a defendant to initiate a motion to recall a sentence. Instead, that section permits a court to recall a sentence 'on its own motion.'" (*People v. Pritchett* (1993) 20 Cal.App.4th 190, 193.) "Consequently, the courts have uniformly held that an order denying a defendant's request to resentence pursuant to section 1170 subdivision (d) is not appealable as an order affecting the substantial rights of the party. This is because the defendant has no right to request such an order in the first instance; consequently, his 'substantial rights' cannot be affected by an order denying that which he had no right to request. [Citations.]" (*Id.* at p. 194.) In accord with *Pritchett,* we conclude that the order denying Martin's motion to modify his sentence was not an appealable order.

Moreover, since more than 120 days had passed since Martin had been sentenced, the court did not have jurisdiction to recall his sentence and this provides an additional basis for rejecting Martin's appeal. (*People v. Turrin* (2009) 176 Cal.App.4th 1200,

1204-1205.)[2] *Turrin* also held that when a defendant appeals from a postjudgment order that is not appealable, the appeal should be dismissed. (*Id*. at p. 1208.)

Martin contends that the imposition of a restitution fine requires the court to consider a defendant's ability to pay and since the court did not do that here, its imposition of a $5,000 restitution fine amounted to an unauthorized sentence that this court can correct at any time. (See e.g., *People v. Scott* (1994) 9 Cal.4th 331, 354-355.) Martin is incorrect.

When Martin was sentenced in 1991, Government Code section 13967 required the court to impose a restitution fine in an amount ranging from $100 to $10,000, without any consideration to a defendant's ability to pay. (*People v. McGhee* (1988) 197 Cal.App.3d 710, 715.) In 1992, an amendment to this section raised the minimum amount of the fine from $100 to $200, and added the language: "subject to the defendant's ability to pay. (Stats. 1992, ch. 682, § 4)." (*People v. Frye* (1994) 21 Cal.App.4th 1483, 1486.) In *Frye*, the court harmonized this language with language from section 1202.4, subdivision (a),[3] and concluded that "a trial court must consider a defendant's ability to pay in imposing even a minimum restitution fine[.]" (*Id*. at p. 1487.) However, since the court was not required in 1991 to consider a defendant's

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[2] In an effort to convince this court that his restitution fine should be reduced to $200, Martin appears to challenge the validity of the 10 percent administrative fee charged by the Department of Corrections and Rehabilitation to cover the costs of collecting restitution fines from inmates. (See § 2085.5.) His challenge to this practice is not cognizable on appeal for the additional reason that the court may only recall a sentence for reasons reasonably related to sentencing and the collection of this fee is not a reason related to sentencing.

[3] At that time, section 1202.4, subdivision (a), provided: "In any case in which a defendant is convicted of a felony, the court shall order the defendant to pay a restitution fine as provided in subdivision (a) of Section 13967 of the Government Code. Such restitution fine ... shall be ordered *regardless of the defendant's present ability to pay*." (Italics added.)

ability to pay when imposing a restitution fine, its imposition of a $5,000 restitution fine in 1991 did not constitute an unauthorized sentence.

In any event, "'[t]he unauthorized sentence exception is "a narrow exception" to the waiver doctrine that normally applies where the sentence "could not lawfully be imposed under any circumstance in the particular case," for example, "where the court violates mandatory provisions governing the length of confinement." [Citations.] The class of nonwaivable claims includes "obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings." [Citations.]'" (*People v. Turrin*, supra, 176 Cal.App.4th at p. 1205.) Consequently, the unauthorized sentence exception to loss of jurisdiction does not apply here for the additional reason that Martin's motion raised a factual issue regarding his ability to pay the restitution fine imposed by the trial court. (*Id*. at p. 1207.)

DISPOSITION

The appeal is dismissed.